SANITARY LEGISLATION.

COURT DECISIONS.

OREGON SUPREME COURT.

Municipal Sewage—Right of a Municipality to Discharge Sewage into a Stream.

STATE BOARD OF HEALTH v. CITY OF SILVERTON, 71 Oreg., 379; 142 Pac. Rep., 609. (July 7, 1914.)

Legislative authority to discharge sewage into a stream does not justify a city in creating a nuisance or in inflicting injuries which amount to the taking of property in a constitutional sense unless it has acquired the right by condemnation and the payment of compensation.

With legislative authority a city may discharge sewage into navigable or tidal streams if done in a proper manner, but it is doubtful if the legislature can authorize such use of a stream the bed and banks of which are in private ownership.

The right of the State to enjoin a nuisance may be delegated to and exercised by the State board of health.

Suit was brought by the State Board of Health of Oregon to prevent the city of Silverton from discharging its sewage into a creek. The court held that the evidence did not show that the pollution of the stream was sufficient to create a menace to health, and for this reason the suit was dismissed.

This is a suit by Andrew C. Smith, C. J. Smith, E. A. Pierce, Alfred Kinney, W. B. Morse, E. B. Pickel, and Calvin S. White, constituting the State Board of Health of Oregon, against the city of Silverton, to enjoin said city from casting its sewage and drainage into Silver Creek. This stream flows through the said city, and during the month of August contains a flow of about 35 second-feet of water running therefrom through a thickly populated agricultural country. It is crossed below the city by various county roads, and is alleged by the plaintiffs to be used by residents along it and by their stock for drinking purposes. The city sewers empty into it on each bank, the flow of which amounts to 0.12 of a second-foot. After taking evidence, a decree was rendered enjoining the defendant from emptying the sewer into the creek. Defendant appeals.

EAKIN, J.: One of the defenses to the suit is that the present sewer system is a great improvement upon the offensive surroundings and insanitary conditions existing prior to the construction of the sewer; but that does not affect the questions involved. The issue is as to whether the present sewer system is a menace to the lives and health of the citizens in the vicinity of the stream. There is very little testimony upon this question except as to the pollution of the water, and that is only opinions of witnesses and no proof of the extent to which the water is used or the effect of such use.

First, we may consider when and how a city may use a natural stream of water as a place of discharge for its sewer system. The rule as recognized by the courts is that a city has no right to cast its sewage into a stream so as to pollute it to the injury of the lower riparian proprietors. There are exceptions to this ruling, dependent upon circumstances, but not involved here. It seems to be elementary that a city's right in that regard is dependent upon legislative authority unless it has first condemned the interests injuriously affected, but it seems that by legislative authority it may with impunity sewer into navigable or tidal streams if done in a proper manner, though it is doubtful if the legislature can authorize it to so use a stream, the bed and banks of which are in private ownership. (See Grey ex rel. Simmons *v.* Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642; Valparaiso *v.* Hagen et al., 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305; Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.)

In this country, even if the legislative authority is conceded, still the question arises as to whether or not injuries are inflicted which amount to a public nuisance or a taking of private property in the constitutional sense; and, if so, the municipality is not protected or justified in such appropriation unless it has acquired the right by condemnation and the payment of compensation.

But the right or privilege granted to the council in the charter of Silverton to construct sewers is not implied authority to pollute the stream, as claimed by the defendant. Such would not be a governmental use or a duty imposed, but only a privilege to construct sewers. (See Platt Bros. & Co. *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335, which is fully annotated.) A distinction in such cases must be noted between the right of a city, even with legislative authority, to pollute a stream in case the title to the bed and banks of the stream is in the riparian owner, and where the State is the owner of the stream. (Platt Bros. & Co. *v.* Waterbury, supra, 48 L. R. A. at p. 704, and notes at pp. 698, 702; Hooker *v.* Rochester, 37 Hun, 181; Attwood *v.* Bangor, 83 Me. 583, 22 Atl. 466; Sayre *v.* Newark, 60 N. J. Eq. 361, 45 Atl. 985, 48 L. R. A. 722, 83 Am. St. Rep. 629; note to Georgetown *v.* Commonwealth, 61 L. R. A. 694, annotating the cases subsequent to the decision in the Platt Bros. case.) Counsel for the defendant cites some authorities upon general statements of the law, but the citations are not opposed to the views above expressed when applied to the facts. 10 Am. & Eng. Enc. Law, 240, 248, and cases cited, and 40 Cyc. 594, cited by defendant, are in harmony here. It is said in the note to Platt Bros. & Co. *v.* Waterbury, supra:

> Whatever may be the rule with respect to surface water, there seems to be no authoritative decisions asserting the right of municipal corporations, merely as riparian owners and without legislative authority, either express or implied, to drain sewage into waters to the injury of others, although there is an intimation to that effect in Valparaiso *v.* Hagen.

Defendant cites and places much reliance on the case of Valparaiso *v.* Hagen, supra, but this case stands almost alone on this question. Farnham on Water and Water Rights, at page 632, says that it is the only case that has refused to recognize the rule that mere permission to construct a sewer system or even to turn the sewer into a particular stream will not authorize the commission of a nuisance, and he discredits the case. He distinguishes Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592, and criticises it at page 639. At page 625, where is a full discussion of the subject, he says that at times, when the flow of a stream is continuous and sufficient to dissolve and carry away the sewage, it may not affect the usefulness of the water, but that at other times it may do so, which renders it a nuisance and a menace to the health of the public.

> It is almost impossible for a municipal corporation of any size to turn its sewage into a water body for any length of time without creating a nuisance, and the question whether it has a right to make such disposal of its sewage depends, therefore, upon its right to create a nuisance, or the power of the legislature to authorize it to do so. * * * The right of a municipal corporation to dispose of its sewage and garbage by turning it into water bodies will be materially simplified by first determining the necessity for doing so. * * * But if it shall appear that it is not only not necessary to dispose of such material by casting it into the water, but that such method of disposal is crude, insanitary, and more harmful than beneficial, and that it has been abandoned throughout all of the more advanced centers of population of the Old World, there would be little to justify a holding that there is power to make such disposal of the waste products.

Then follow about two pages of description of the septic tank and its effectiveness, after which he continues:

> "This is accomplished, too, with an entire absence of injury, or even offense, to persons living in the immediate vicinity of the works." So long as this method of disposal is practical, there is no reason for permitting a municipality to create a nuisance with these waste products. * * * Having seen that sewage may be rendered harmless, and that casting it into the watercourses in its natural condition is unnecessary, the solution of the question of the right of the municipality to do so becomes a simple one. The overwhelming weight of authority denies such right.

However, these cases and notes are largely discussing private injuries or their effect upon private property or individuals, while in this case the suit is brought by the State board of health to enjoin a public nuisance in the interests of public health. Here there is no complaint that private property has been taken nor that the health of any individual or community has been affected. It is not alleged that such is the result, but that the lives and health of citizens are endangered thereby, and the proof is to that effect. Neither is it contended that the stream is rendered foul smelling or otherwise offensive. But two questions are discussed or presented, namely, as to the authority of the State board to maintain this suit against a city in Marion County and the right of the defendant to drain the city's sewage into Silver Creek. Defendant first insists that such a suit can be instituted only by the State in the name and by the authority of the district attorney.

The right of the State to enjoin a nuisance may be delegated to and exercised by a city or other power especially named by it for that purpose. (Bernard *v.* Willamette Box & Lumber Co., 64 Or. 226, 129 Pac. 1039.)

The statute creating the State board of health (sec. 4693, L. O. L.) provides:

> In cities, districts, and places having no local boards of health, or in case the sanitary laws or regulations in places where boards of health or health officers exist should be inoperative, the State board of health shall have power and authority to order nuisances * * * to be abated and removed.

There is a criminal penalty attached to this section, but the section necessarily includes authority to have the nuisance abated. In a proper case this may be done by injunction. (See 21 Cyc. 398; Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275.) It is said in Parker and Worthington on Public Health and Safety, page 102, that the health board may maintain actions in any court or restrain by injunction violations of and noncompliance with its orders. (21 Cyc. 401.) No doubt such authority in the board extends only to nuisances which endanger the health of individuals or communities and to places where the sanitary laws are inoperative. But the power of the board to act must be made out upon satisfactory evidence that the act of the city creates a public nuisance; or if the danger is only apprehended, as in this case, facts must be established which show the danger to be real and imminent. It is said in High on Injunctions, section 811:

> Where the injury resulting from the pollution of water by sewage from a city is not imminent and will result, if at all, only in the future, * * * relief by injunction will be denied, * * * where the fact of the nuisance is not made out by clear and satisfactory evidence.

See also Hutchinson *v.* Delano, 46 Kan. 345, 26 Pac. 740; Newark Aqueduct Board *v.* Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55; Parker and Worthington on Health and Safety, sections 183, 184, 221.

The actual existence of the nuisance must be established. (Eagan *v.* New York Health Department, 20 Misc. Rep. 38, 45 N. Y. Supp. 325; note to Grossman *v.* Oakland, 36 L. R. A. 603.)

There is no proof here as to the use of the water of the stream for domestic purposes or for stock, or that there is likely to be such use. Farnham on Water and Water Rights at page 647, says:

> Injunction is a proper remedy to abate a nuisance, but it is not every case in which it will be granted in the first instance. If the discharge of sewage into the stream does not create a nuisance, an injunction will be refused. And in view of the public necessities involved, the court will be slow in granting the injunction if any other form of relief is available. The injunction will also be refused if the nuisance is merely anticipated.

See cases cited in note to this text.

Again, at page 544, it is said that the authority does not justify arbitrary action; that if the property does not constitute a nuisance the board has no power to interfere with it.

The plaintiff has not established the fact that a public nuisance has been created, and is not entitled to an injunction. The case will be reversed and the suit dismissed.

McBRIDE, C. J., and McNARY and RAMSEY, JJ., concur. BEAN, J., not sitting.